No. 15746

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONCEPCION ESTRADA-OJEDA,

Appellant,

vs.

ALBERT DEL GUERCIO, Officer in Charge, Immigration and Naturalization Service at Los Angeles, California, *et al.,*

Appellees.

APPELLEES' BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division,

BRUCE A. BEVAN, JR.,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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TABLE OF AUTHORITIES CITED

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APPELLEES' BRIEF.

Statement of Jurisdiction.

On April 26, 1956, appellant filed her Complaint for Judicial Review and Declaratory Judgment.* The answer of appellees was filed on June 28, 1956. On April 1 and April 8, 1957, the action was tried before the Honorable William M. Byrne, United States District Judge. Judgment was entered in favor of appellees on May 3, 1957. A timely notice of appeal was filed on June 4, 1957.

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*No reference can be made to the transcript of record since none has been prepared at the present time.

The District Court had jurisdiction of the action pursuant to United States Code, Title 5, Section 1009. This Court has jurisdiction of the appeal pursuant to United States Code, Title 28, Section 1291.

Statement of the Case.

Only two questions are involved in this appeal. The first is whether appellant was properly found deportable on the charge that, at the time of her last entry into the United States, she was a person likely to become a public charge. The second is whether the Immigration and Naturalization Service properly determined that appellant had not proved her good moral character in connection with her application for suspension of deportation or for voluntary departure. These questions arose in the following manner:

Appellant is a native and citizen of Mexico who was lawfully admitted into the United States for permanent residence on June 15, 1943. Her last entry occurred on September 15, 1951. On May 27, 1952, appellant was served with a warrant of arrest in deportation proceedings which charged that she was subject to deportation pursuant to former Title 8, U. S. C. §136(i), in that at the time of her last entry, she was a person likely to become a public charge.

A deportation hearing was held pursuant to these charges on September 26, 1952, as a result of which the Hearing Officer ordered appellant deported on December 2, 1952. An administrative appeal of this order

was taken to the Board of Immigration Appeals. On July 17, 1953, the Board entered an order sustaining the finding of deportability, but granted appellant the privilege of voluntary departure in lieu of deportation.

On November 16, 1953, appellant moved the Board to reopen the case, and on Jannary 4, 1954, the Board ordered the deportation hearing reopened. On April 21, 1954, another hearing was held before a Special Inquiry Officer. On May 10, 1954, the Officer found that appellant was deportable, but ordered appellant be granted the privilege of suspension of deportation, subject to the approval of Congress. On January 3, 1955, the hearing was reopened on the Special Inquiry Officer's own motion in order to take additional evidence relating to appellant's moral character.

Additional such evidence was taken on January 28, 1955, and on August 5, 1955. On November 10, 1955, a Special Inquiry Officer again found appellant deportable and, from the new evidence taken, found that appellant had not established her good moral character. Consequently, he ordered appellant deported and ordered that her application for suspension of deportation or voluntary departure be denied. The Board of Immigration Appeals affirmed this decision on January 20, 1956.

ARGUMENT.

I.

Preliminary Statement.

This Court need merely determine whether there was reasonable, substantial and probative evidence to support the two questioned findings of the Immigration and Naturalization Service. It need not review the Immigration and Naturalization Service determinations *de novo* to determine the correctness thereof. As was succinctly stated in *Yasuji Fumita v. Nagle,* 58 F. 2d 184, 186 (9 Cir., 1932):

> "That the findings of the Secretary of Labor are conclusive and binding upon this court, where there is any evidence in the record to substantiate them, is too well settled to require citation of authorities."

Accord:

Ali v. Haff, 114 F. 2d 369, 373 (9 Cir., 1940);
Ow Tai Jung v. Haff, 89 F. 2d 329 (9 Cir., 1937).

Consequently, the issue is not whether this Court might have decided the two questions herein involved differently than did the Immigration and Naturalization Service, but whether there existed some evidence to support the administrative determinations.

II.

At the Time of Her Last Entry, Appellant Was a Person Likely to Become a Public Charge.

Appellant challenges the finding of the Special Inquiry Officer that she was a person likely to become a public charge at the time of her entry into the United States on September 15, 1951. The term "likely to become a public charge" has been defined judicially. In the case

of *In re Keshishian,* 299 Fed. 804 (D. C. N. Y., 1924), it was stated:

> "In order to constitute them likely to become a public charge, there must be evidence that they are likely to be supported at the expense of the public."

In *Ex parte Mitchell,* 256 Fed. 229, 230 (D. C. N. Y. 1919), the Court held:

> "A 'person likely to become a public charge' is one who for some cause or reason appears about to become a charge on the public, one who is to be supported at public expense, by reason of poverty . . ."

The Court further indicated that there should be evidence that the alien at some time had "relied on the charity of others" in order to sustain this ground of deportation. In the instant case, there is abundant evidence that appellant relied upon public charity, both before and after her entry on September 15, 1951. Exhibits 5 and 20, introduced at the deportation hearing, reflect the following:

Appellant received aid from the Bureau of Public Assistance in the form of general relief from October 31, 1947, to December 31, 1948, amounting to $759.45. In view of the birth of an illegitimate child in 1948, the form of relief was changed on January 1, 1949, to Aid for Needy Children which continued through August 31, 1953, and which amounted to $5,010.27. In addition, appellant received aid from the Los Angeles County Hospital from February 10, 1948, through June 11, 1953, in the total sum of $700.03. Thus a total of $6,469.75 in public relief was given appellant from 1947 to 1953.

Appellant's first contention regarding deportability appears to be that appellant would have been self-supporting had it not been for the birth of her daughter in 1948. It is true that appellant might have been able to work had she not been encumbered by a child of tender years, but this does not make her any less likely a public charge. Appellant's argument merely recites the cause, but does not affect the fact of her indigence.

Appellant's second contention concerns whether she need have reimbursed the County of Los Angeles for the $5,010.27 given as Aid for Needy Children. Irrespective of whether such aid was reimbursable, it constituted public charity upon which appellant was required to rely. Consequently such aid is evidence of appellant's destitution just as much as is reimbursable aid.

There would seem to be no real question of appellant's deportability. At the time of her entry on September 15, 1951, she had a three-year-old child to support, was jobless, had no one who was legally obligated to support her, and she had received considerable assistance from public charities in this country prior to such entry. The facts occurring subsequent to her entry further bear out her status. Appellant was forced to resort to public charity for her existence of and that of her daughter until August 31, 1953. Consequently, the finding that appellant was likely to become a public charge at the time of her entry was amply supported by the evidence.

III.

Appellant Was Ineligible for Discretionary Relief Because She Did Not Prove Her Good Moral Character.

In the administrative proceeding, appellant requested the discretionary relief either of suspension of deportation or of voluntary departure. The statute authorizing such relief, former Title 8, U. S. C. §155(c), placed the burden of establishing good character upon the alien:

> "In the case of an alien . . . who has *proved* good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation, or (2) suspend deportation of such alien . . ." (Emphasis added.)

The Board decision of July 17, 1953, overruled the Hearing Officer's determination that appellant had not been a person of good moral character for the preceding five years. The Board gave its rationale as follows:

> "The respondent testified that she lived with the father of her child for about four years but when the baby was born, he left her . . . We have held that a finding of good moral character is not precluded under the provisions of Section 19(c) of the Immigration Act of 1917, as amended, where such a relationship as here presented injures no one, no family was broken up, the public was not offended, and the alien had no other blemish on his record (*Matter of O.....*, 3889600, A. G. December 18, 1947, 2 I. & N. Dec. 840).
>
> *"Here the evidence shows that the relationship terminated in 1948.* The respondent testified that

it was necessary for her to seek relief when the father of her child left her and she had no one to care for the child while she worked. *Under the circumstances,* we find respondent to have been a person of good moral character for the preceding five years." (Emphasis added.)

Thus, because appellant had terminated her illicit relationship at least four years before her application for relief, and because appellant had no other blemish on her record, the Board at that time did not bar her from discretionary relief. Further relief was granted appellant by the May 10, 1954, opinion of a Special Inquiry Officer.

After the case was reopened to hear new evidence on the issue of moral character, the hearings of January 28, 1955, and August 5, 1955, were held. In those hearings, an undercover agent of the federal Bureau of Narcotics testified as follows: he and appellant had held a conversation relating to the possible purchase of narcotics from appellant's brother-in-law, Jose Garcia, wherein appellant had stated that such was a very dangerous business and she was reluctant to give out Garcia's address as she might be arrested. Later appellant furnished Garcia's address. The agent went to appellant's house on a least eight occasions and discussed the sale of narcotics with Jesus Valenzuela-Orantes and Garcia. Eventually the agent purchased two ounces of heroin from Garcia and Orantes at said residence.

Although appellant in the January 28, 1955, hearing denied living with Orantes, she later admitted in the

August 5, 1955, hearing that he had lived with her in her apartment for the previous two years. Appellant also stated that Valenzuela was the father of her child stillborn at the Los Angeles County Hospital on May 29, 1953. Appellant further stated that Valenzuela still came to her apartment and she still continued to have weekly sexual relations with him.

It was in view of the foregoing evidence that the Special Inquiry Officer on November 10, 1955, and the Board on January 20, 1956, found that appellant had not proved her good moral character for the preceding five years. Appellant cites as authority for the proposition that illicit sexual relations do not preclude a finding of good moral character, the same case cited in the above-quoted opinion of the Board on July 17, 1953. The distinguishing feature of this case, however, is that appellant has more than one illicit blemish on her record, and her latest affair still continues. Also, the Board opinion in the *Matter of O*..... which appellant cites, is rather poor authority for this Court to consider, since the decision of the same Board in the instant case was adverse to appellant.

Appellant further argues, at page 9 of her Brief, that the decision of the Special Inquiry Officer on November 10, 1955, was "utterly contrary" to the decision of the Hearing officer of May 10, 1954, in that appellant was held eligible for suspension of deportation in the latter decision. Such inconsistency, however, is not the indicia of error. Instead the criteria is whether there was reason-

able, substantial and probative evidence to support the finding of November 10, 1955. Needless to say, appellant's illicit relationship with Jesus Orantes is sufficient evidence upon which to predicate a finding that appellant had not proved her good moral character.

Appellant, at page 4 of her Brief, asserts that "the basis of the special inquiry officer's decision was the fact that a criminal charge involving the appellant had been subsequently dropped or held in abeyance." There may be authority for the proposition that a criminal charge not resulting in conviction cannot be the basis of a finding of bad moral character. Apparently appellant seeks to twist the facts in order to use such authority. However, a reading of the November 10, 1955, opinion of the Special Inquiry Officer will reveal that the above-quoted assertion is not correct. It was not the fact, *per se,* of a criminal charge having been filed against appellant that affected the Special Inquiry Officer; instead it was the sworn testimony of a federal narcotic agent as to appellant's activities which resulted in the finding of which appellant complains. Such testimony was competent evidence from which the Special Inquiry Officer could have inferred that appellant associated closely with narcotic traffickers and facilitated their sales by allowing her residence to be used as their meeting place.

In any event, the undisputed fact of appellant's existing illicit relationship is a sufficient predicate, standing alone, for the finding that she did not prove her good moral character. Consequently, the Immigration and Naturali-

zation Service did not err in its finding as to appellant's moral character and the resultant conclusion that she was therefore ineligible for discretionary relief.

Conclusion.

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division,

BRUCE A. BEVAN, JR.,
Assistant U. S. Attorney,
Attorneys for Appellees.